

JAN 23 1976

MICHAEL BRADY, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1975.

**No. 75-817**

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINT-  
ING CO.; WESTERN PUBLISHING CO.; NORTH  
PLATTE BROADCASTING CO.; NEBRASKA BROAD-  
CASTERS ASSOCIATION; ASSOCIATED PRESS;  
UNITED PRESS INTERNATIONAL; NEBRASKA PRO-  
FESSIONAL CHAPTER OF THE SOCIETY OF PRO-  
FESSIONAL JOURNALISTS/SIGMA DELTA CHI;  
KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES  
HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT  
COURT OF LINCOLN COUNTY, NEBRASKA,

*Respondent.*

**BRIEF FOR TRIBUNE COMPANY  
AS AMICUS CURIAE.**

DON H. REUBEN,  
LAWRENCE GUNNELS,  
JAMES A. KLENK,

200 East Randolph Drive,  
Chicago, Illinois 60601,  
(312) 861-2000,

*Attorneys for Tribune Company.*

Of Counsel:

KIRKLAND & ELLIS,  
200 East Randolph Drive,  
Chicago, Illinois 60601.

## TABLE OF CONTENTS.

	PAGE
Interest of Amicus .....	2
Argument .....	2
I. The True Impact of Media Publicity on Jury Verdicts Is Unknown .....	3
II. There Is No Evidence That Publicity Presented Any Serious Threat in This Case .....	5
III. Prior Restraint Is Unjustified.....	7
IV. The Result Here and the Future of Press Freedom	9
Conclusion .....	11

### CITATIONS.

#### *Cases.*

Associated Press v. Walker, 388 U. S. 130 (1967).....	2
Barker v. Wingo, 407 U. S. 514 (1972) .....	8
Beck v. Washington, 369 U. S. 541 (1962) .....	8, 9
Bridges v. California, 314 U. S. 252 (1943) .....	5, 11
City of Chicago v. Tribune Co., 307 Ill. 595, 139 N. E. 86 (1923) .....	2
Craig v. Harney, 331 U. S. 367 (1947) .....	5
Irvin v. Dowd, 366 U. S. 717 (1961) .....	8
Miami Herald Pub. Co. v. Tornillo, 418 U. S. 241 (1974)	2
Near v. Minnesota, 283 U. S. 697 (1931).....	2
New York Times Co. v. Sullivan, 376 U. S. 254 (1964) ..	2
Pennekamp v. Florida, 328 U. S. 331 (1946) .....	5
Shelton v. Tucker, 364 U. S. 479 (1960) .....	8
Shepherd v. Florida, 341 U. S. 50 (1951).....	9

Sheppard v. Maxwell, 384 U. S. 333 (1966) .....	6, 8
Stroble v. California, 343 U. S. 181 (1952) .....	9
United States v. Isaacs, 493 F. 2d 1124 (7th Cir. 1974) ..	7
United States v. Robel, 389 U. S. 258 (1967) .....	8

#### Statute.

Speedy Trial Act of 1974, Pub. L. No. 93-619 (January 3, 1975) .....	8
--	---

#### Miscellaneous.

A. B. A. Project on Minimum Standards for Criminal Justice, <i>Standards Relating to Fair Trial and Free Press</i> (Tentative Draft 1966) .....	7
Allport & Postman, <i>The Psychology of Rumor</i> (1947) ...	10
Comment, <i>The Free Press-Fair Trial Controversy—An Empirical Approach</i> , 2 Conn. L. Rev. 351 (1969) ....	3
Connors, <i>Prejudicial Publicity: An Assessment</i> , Journalism Monographs, No. 41, September, 1975 at 20 .....	3, 4
Ely, <i>Trial by Newspaper &amp; Its Cures</i> , Encounter, March, 1967 at 92 .....	10
Friendly & Goldfarb, <i>Crime &amp; Publicity</i> (1967) .....	7, 10, 11
Gillmor, <i>Free Press and Fair Trial</i> (1966) .....	3
Gillmor, <i>Free Press and Fair Trial in English Law</i> , 22 Wash. & Lee L. Rev. 17 (1965) .....	11
Grady, <i>Prejudicial Pretrial Publicity: Its Effect on Jurors</i> (Master's Thesis Northwestern Univ. 1972) .....	4
Kalven & Zeisel, <i>The American Jury</i> (1966) .....	3
Kline & Jess, <i>Prejudicial Publicity: Its Effect on Law School Mock Juries</i> , 43 Journalism Q. 113 (1966) .....	4

Levine & Murphy, <i>The Learning and Forgetting of Controversial Material</i> , 38 J. Abnormal & Social Psych. 507 (1943) .....	7
LeWine, <i>What Constitutes Prejudicial Publicity in Pending Cases?</i> , 51 A. B. A. J. 942 (1965) .....	7
Lord, <i>Day of Infamy</i> (1957) .....	10
Padewar-Singer, Singer & Singer, <i>Voir Dire by Two Lawyers</i> , 57 Judicature 386 (1974) .....	4
Smith & Smith, <i>How Not to Get a Fair Trial</i> , Psychology Today, May, 1974 at 86 .....	4
Tans & Chaffee, <i>Pretrial Publicity and Juror Prejudice</i> , 43 Journalism Q. 547 (1966) .....	4
Wilcox, <i>The Press, The Jury, and The Behavioral Sciences</i> , Journalism Monographs, No. 9, October, 1968 .....	4
Wright, <i>Fair Trial—Free Press</i> , 38 F. R. D. 435 (1965) ..	6

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975.

---

**No. 75-817.**

---

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINT-  
ING CO.; WESTERN PUBLISHING CO.; NORTH  
PLATTE BROADCASTING CO.; NEBRASKA BROAD-  
CASTERS ASSOCIATION; ASSOCIATED PRESS;  
UNITED PRESS INTERNATIONAL; NEBRASKA PRO-  
FESSIONAL CHAPTER OF THE SOCIETY OF PRO-  
FESSIONAL JOURNALISTS/SIGMA DELTA CHI;  
KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES  
HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT  
COURT OF LINCOLN COUNTY, NEBRASKA,

*Respondent.*

---

**BRIEF FOR TRIBUNE COMPANY  
AS AMICUS CURIAE.**

---

*May It Please the Court:*

The Tribune Company respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

### INTEREST OF AMICUS.

Tribune Company is the parent-owner of Chicago Tribune Company, publisher of the *Chicago Tribune*, and New York News, Inc., publisher of the *New York News*. The *Chicago Tribune* and the *New York News* are two of the largest circulating daily and Sunday metropolitan newspapers in the United States; both newspapers are deeply and vitally committed to the preservation and advancement of First Amendment freedom of the press. Past cases in which this *amicus* has participated or appeared on behalf of press freedom include *Near v. Minnesota*, 283 U. S. 697 (1931); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Associated Press v. Walker*, 388 U. S. 130 (1967); *Miami Herald Pub. Co. v. Tornillo*, 418 U. S. 241 (1974); *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N. E. 86 (1923).

### ARGUMENT.

The petitioners' amended petition for certiorari succinctly demonstrates that the Nebraska Supreme Court's decision is an unprecedented departure from the holdings of this Court under the First and Fourteenth Amendments. If it were necessary and appropriate to do so in this case, we would argue the petitioners' view of the Constitution. However, rather than duplicate that discussion or assume the role of a Greek chorus, we shall focus on what is empirically known about the impact of pretrial publicity on jury verdicts. We believe a strong dash of reality is needed to place this case in proper perspective.

The problem of reconciling the First Amendment freedom of the press to report on judicial proceedings with the Sixth Amendment right of an accused to a fair trial is too often viewed as a Gordian knot. Regrettably, in the bulk of the papers before the Court in this case the issue has been cast in terms of absolutes—The First Amendment v. The Sixth Amendment. In our judg-

ment, however, this Court is not confronted with a record upon which it is appropriate to assess whether there is in fact a head-on clash of fundamental constitutional rights that must be resolved. The Court is not compelled on this record to exercise the wisdom of Solomon and choose between an irresistible force and an immovable object.

### I. The True Impact of Media Publicity on Jury Verdicts Is Unknown.

At the heart of the current "fair trial—free press" controversy is the unverified and taken-for-granted premise that pretrial publicity in a sensational criminal case will indelibly bias prospective jurors against the defendant. This *a priori* assumption ignores that, in reality, very little is known about whether pretrial publicity in fact compromises the impartiality of future jurors. What little sociological and psychological data there is appears inconclusive. See Connors, *Prejudicial Publicity: An Assessment*, Journalism Monographs, No. 41, September, 1975 at 20; Comment, *The Free Press-Fair Trial Controversy—An Empirical Approach*, 2 Conn. L. Rev. 351 (1969).

Kalven and Zeisel's Chicago Jury Project Study, *The American Jury* (1966), is perhaps the definitive treatise to date on the American jury system. This Project analyzed the factors that influenced jury verdicts in 3,576 actual criminal trials. Although the Project's questionnaires contained no specific reference to pretrial publicity, not a single one of the 550 judges reporting on the trials suggested that pretrial publicity had any influence whatsoever on jurors' verdicts. From his experience on the Project, Professor Kalven has concluded "that the jury is a pretty stubborn, healthy institution not likely to be overwhelmed by a remark of counsel or a remark in the press." Letter to Judge Herbert F. Goodrich cited in D. Gillmor, *Free Press and Fair Trial*, 206-7 (1966).

The few empirical studies that have attempted to assay the impact of pretrial publicity on jury verdicts offer muddled and

conflicting results. Professor Rita Simon, for example, examined the responses of two groups of experimental jurors to a tape recorded trial. One group was exposed to "sensational" press accounts that included the defendant's prior criminal record; the other group received neutral press reports. Prior to trial, 67 percent of the sensational group believed the defendant guilty, while only 37 percent of the neutral group believed him guilty. After the trial, only 25 percent of the sensational group believed the defendant guilty—a reduction of 42 percent—and 22 percent of the neutral group believed him guilty. These findings plainly suggest that the impact of pretrial publicity on jury verdicts is negligible at best. Cited in Wilcox, *The Press, The Jury, and the Behavioral Sciences*, Journalism Monographs, No. 9, October, 1968. See generally, Grady, *Prejudicial Pretrial Publicity: Its Effect on Jurors* (Master's Thesis Northwestern Univ. 1972); Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 Journalism Q. 547 (1966); Kline & Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 Journalism Q. 113 (1966).

Data gathered by Padewar-Singer and Barton, on the other hand, suggest some correlation between "prejudicial" pretrial publicity and guilty verdicts. Again, jurors were exposed to differing news accounts and a tape recorded trial. The "prejudicial" news accounts referred to the defendant's prior criminal record and a confession. After trial, 78 percent of the jurors exposed to the prejudicial account believed the defendant guilty, while 55 percent of the jurors exposed to the neutral account believed him guilty. Cited in Connors, *Prejudicial Publicity: An Assessment*, Journalism Monographs, No. 41, September, 1975. See generally, Padewar-Singer, Singer & Singer, *Voir Dire by Two Lawyers*, 57 Judicature 386 (1974); Smith & Smith, *How Not to Get a Fair Trial*, Psychology Today, May, 1974 at 86.

The significance of the foregoing studies and the cited related authorities lies in their demonstration that even among un-

biased experts there is sharp disagreement over the effect of publicity on criminal trials. Setting definitive standards on such sociological quicksand is risky business. All that one can conclude is that a guilty verdict does not ineluctably flow from prejudicial pretrial publicity. Most certainly there is no basis, either in proven fact or in ivory tower logic, for the *a priori* assumption that a given amount of publicity renders the defendant's conviction inevitable.

## II. There Is No Evidence That Publicity Presented Any Serious Threat in This Case.

This Court has uniformly held that the press may not be restrained from reporting or commenting on pending judicial proceedings unless there is a "serious and imminent danger to the impartial administration of justice." *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331, 334-36 (1946); *Bridges v. California*, 314 U. S. 252, 263 (1943). As the Court declared in *Pennekamp*:

"Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the border-line instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." 328 U. S. at 347.

The guiding principle to be distilled from these and other First Amendment decisions of this Court is that the right of the press to report what transpires concerning a pending judicial proceeding will not be disturbed in any way unless there has been a clear and convincing showing that judicial action is absolutely necessary to insure the fair administration of justice.

The trial judge and the Nebraska Supreme Court, we submit, paid no more than lip service to these well-settled principles of

First Amendment adjudication. The record in the instant case is singularly lacking in any clear indicia that the defendant Simants' Sixth Amendment right to a fair trial was imperiled. With Simants' counsel consenting to the prosecution's motion to restrict pretrial press coverage, Judge Stuart's order was entered as if by stipulation of the parties. No attempt was made to determine the actual impact of publicity on the community. No attempt was made at that time to impanel a jury. And no attempt was made to assess whether there was or could be a sufficient hiatus between the crime and trial to solve any alleged publicity problem that might be encountered.

All that appears to have been offered were the self-serving statements of the county judge who summarily ordered the initial ban on publicity and certain newspaper accounts that connected the defendant with the commission of a heinous crime.<sup>1</sup> Such a "showing" could be made in almost any prosecution for a violent crime. If this is all that is required to abridge or stifle preferred First Amendment rights, those rights are supported by the thinnest of reeds. The First Amendment has become a wisp of straw instead of a cornerstone of freedom.

We entertain grave doubts as to whether pretrial publicity can ever be shown to pose a serious and imminent danger to the impartial administration of justice at the very outset of a criminal prosecution. Common sense as well as the available empirical data suggest that pretrial publicity is only likely to become an issue in the rare, celebrity case. Judge Wright, for example, has estimated that the problem arises in only "a small fraction of a small fraction of criminal cases." Wright, *Fair Trial—Free Press*, 38 F. R. D. 435, 437 (1965). The paradigms of Dr. Sam Sheppard and Billie Sol Estes are often cited;<sup>2</sup> however, even

1. The opinion of the Nebraska Supreme Court is reproduced at 44a of the Petitioner's Amended Petition for Certiorari.

2. Any student of criminal justice administration must recognize that these cases are aberrations. The conduct of the judge in the *Sheppard* case was in many respects itself so outrageous that it alone compelled a new trial. *Sheppard v. Maxwell*, 384 U. S. 333, 352-54, 358 n. 11 (1966).

the *cause celebre* defendant is not necessarily prejudiced by the media, as is attested by the recent acquittals of John Mitchell, Maurice Stans, and John Connally during the zenith of Watergate.

The vast bulk of all crime-related pretrial publicity occurs at the time a criminal suspect is arrested or indicted. A. B. A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*, 166, 195 (Tentative Draft 1966); Friendly & Goldfarb, *Crime & Publicity*, 61 (1967). The accused will not be tried for the crime for several months—indeed, up to a year may elapse between indictment and trial. See *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir. 1974). Due to the passage of time and the defects of human memory, the impact of this initial flurry of publicity upon jurors is *de minimis*, if extant at all. LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?* 51 A. B. A. J. 942, 945 (1965); Levine & Murphy, *The Learning and Forgetting of Controversial Material*, 38 J. Abnormal & Social Psych. 507 (1943). Thus, any judgment as to the seriousness of possible prejudice prior to actual jury selection will necessarily be premature and was so here.

In short, we submit that respondent has succumbed to the inherent predilection of a trial judge to avoid reversal at almost any price. At best, his order was entered on mere conjecture; there was no showing of serious and imminent peril to the defendant Simants' Sixth Amendment rights. There was not even the color of an attempt to assess if there was a so-called publicity problem.

### III. Prior Restraint Is Unjustified.

Whether pretrial publicity may in fact pose a genuine threat to a fair trial can only be judged when the venire is in the courtroom and jury selection begins. This is the first opportunity the trial judge has to make an objective and realistic appraisal of the actual impact of the news coverage. By polling the veniremen upon *voire dire*, the trial judge can directly glean

the effect of publicity, if any, on prospective jurors. While the judge cannot absolutely tell that jurors are in fact biased, he can determine if there is a significant likelihood that an unbiased jury cannot be impaneled. Compare *Irvin v. Dowd*, 366 U. S. 717, 727 (1961) with *Beck v. Washington*, 369 U. S. 541, 556-57 (1962).

Upon such inquiry, if a judge concludes that pretrial publicity endangers the fairness or even the appearance of fairness of the trial, he still has no need to "gag" the media. The judge can either continue the case until the controversial publicity subsides or order a change of venue to a locale where the impact of the publicity is not so pronounced.<sup>3</sup> Moreover, the judge at that point is in a position, informally and upon an *ad hoc* basis, to dialogue with the press. An understanding of the problem in the context of reality rather than conjured horrors should and, we think, would lead in most instances to an accommodation of the interests involved. But here there was no First Amendment sensitivity. The Nebraska Supreme Court and Judge Stuart did not even consider the employment and efficacy of these less drastic means. See, e.g., *United States v. Robel*, 389 U. S. 258, 268 (1967); *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

In *Sheppard v. Maxwell*, 384 U. S. 333 (1966) the Court recommended the very alternative remedies that we urge should have been employed here if in truth needed. Nowhere in *Sheppard* did the Court suggest that newspapers be enjoined from

3. These solutions to the pretrial publicity problem necessarily entail delay, but we see no threat to the criminal defendant's Sixth Amendment right to a speedy trial. Congress has authorized federal district judges to continue criminal trials if such action is necessary to further "the ends of justice," Speedy Trial Act of 1974, Pub. L. No. 93-619, § 3161(h)(8)(A) (January 3, 1975), and this Court has held that whether there has been a denial of this Sixth Amendment right depends in large part upon the reason the trial of the defendant is delayed. See, e.g., *Barker v. Wingo*, 407 U. S. 514, 531 (1972). We can imagine no more cogent justification than that delay is necessary to secure a jury that is perceived to be bias-free.

publicizing the facts and circumstances of a pending criminal prosecution. Rather, the Court admonished that:

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, *the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.*" 384 U. S. at 362-63. (Emphasis added.)

Nothing has occurred since 1966 to alter this view. Knowledge of the true impact of pretrial publicity on jury verdicts remains uncertain. Common sense, as this Court has recognized, still tells us that human memories fade and that, as the time span between publicity and trial increases, the likelihood of prejudice rapidly diminishes. See *Beck v. Washington*, 369 U. S. 541 (1962) (5 months); *Stroble v. California*, 343 U. S. 181, 191, 195 (1952) (6 weeks). Moreover, there is no evidence contrary to the conventional view that the impact of publicity is to a great degree geographically localized so that a change in trial situs can solve any problem that does develop. See *Shepherd v. Florida*, 341 U. S. 50, 52-53 (1951) (Jackson, J., concurring).

We see no reason to depart from the standards this Court postulated in *Sheppard v. Maxwell*. No compelling justification or change of circumstance has been advanced to warrant the unprecedented resort to prior restraint.

#### IV. The Result Here and the Future of Press Freedom.

The importance of this case, we submit, is not that it can or will reconcile First and Sixth Amendment rights. To the contrary, there has not been even a *prima facie* showing that

pretrial press coverage has jeopardized the defendant Simants' right to a fair trial. Rather, the overriding significance of this case lies in the fact that this Court has never before been asked to jettison or subordinate First Amendment rights on such a flimsy basis. The Court need look no further for grounds to reverse.

There may come a time when the Court will be compelled to make the hard choice between the values of the First and Sixth Amendments. If that decision is to be made, we think that all the interests at stake will be better served if the courts have first thoroughly and objectively documented the actual impact of pretrial publicity upon prospective jurors by meaningful voir dire examinations. Over time, the efficacy of the remedies suggested in *Sheppard* can be appraised and the frequency of the problem gauged in the informed light of experience.<sup>4</sup> If, as we suspect, the incidence of true inability to secure a fair trial occurs, if at all, only once in a decade or so, the Court may decide not to attempt to square the circle, but to adopt the alternative suggested by Professor John Hart Ely in *Trial By Newspaper & Its Cures*, Encounter, March, 1967 at 92:

"Once in a while (a very long while, given the availability of continuance and venue change) there may arise a case so sensational that all the procedural devices in the world will not be able to guarantee the defendant a jury which has not been touched by the publicity. In such a case, if the press is to be left free and the right to a fair trial preserved, the only alternative will be to let the de-

4. Another relevant factor to place in the scale is the distinct and disturbing possibility that criminal defendants could well be harmed more than helped by judicial censorship of pretrial publicity. When a sensational or horrendous crime is committed, particularly in a smaller community or rural area, followed by an official ban or blackout of media news reporting, rumor and gossip quickly become the order of the day. Friendly & Goldfarb, *Crime and Publicity*, 79 (1967). As wartime experience with news censorship in this country has demonstrated, "Rumor flies in the absence of news . . .," and minor facts or half-truths soon become exaggerated to shocking and horrifying proportions. Allport and Postman, *The Psychology of Rumor*, 15 (1947). See also Lord, *Day of Infamy*, 202-03 (1957).

fendant go free. The freeing of a man who may well be guilty is not a desirable occurrence. But if it is the only way the two fundamental rights can be preserved, again, is it not worth the price?"

In sum, we believe that the Court need not here reach the "tough" question of whether the First or the Sixth Amendment must prevail where a true conflict of these fundamental rights has not been shown. Were this case to present that issue we have no doubt that the First Amendment must prevail. To silence the press in deference to the accused is the British way. See, e.g., Friendly & Goldfarb, *Crime & Publicity*, 141-57 (1967); Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L. Rev. 17 (1965). Our American hierarchy of values has no place for such censorship of the press. *Bridges v. California*, 314 U. S. 252, 264-65 (1941). But we respectfully submit that it would be judicially intemperate and most premature to reach that kind of issue on this record.

### CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the Nebraska Supreme Court should be reversed.

Respectfully submitted,

DON H. REUBEN,  
LAWRENCE GUNNELS,  
JAMES A. KLENK,  
200 East Randolph Drive,  
Chicago, Illinois 60601,  
(312) 861-2000,  
*Attorneys for Tribune Company.*

Of Counsel:

KIRKLAND & ELLIS,  
200 East Randolph Drive,  
Chicago, Illinois 60601.

January 22, 1976.